(3)

Supreme Court, U.S.
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No. 95-1963

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

FRED RUCKER,

Petitioner,

v.

CITICORP SAVINGS OF ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District

CITICORP'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Dated: June 7, 1996

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Supreme Court lacks jurisdiction to accept Rucker's Petition for Writ of Certiorari because no federal constitutional issues were raised below.

II. Whether dismissal of an appeal when a case is rendered moot and the court cannot grant effective relief violates due process.

LIST OF PARENTS AND SUBSIDIARIES OF CITIBANK, F.S.B. PURSUANT TO SUPREME COURT RULE 29.6

A. Citicorp Savings of Illinois, n/k/a Citibank, F.S.B. ("Citibank") is a subsidiary of Citicorp Banking Corporation, which itself is a subsidiary of Citicorp.

B. The following entities are first or second tier subsidiaries of Citibank:

Citibank Service Corporation
Citicorp Acceptance Corporation
Holiday Harbor Management Corp.
Citibank Acceptance Service Corp.
Citibank Mortgage Services, Inc.
Citicorp Financial Services Corp.
Citicorp Insurance Agency, Inc.
Camco Management, Inc.
Park Plaza Holdings, Inc.
Citibank Insurance Agency, Inc.
Citicorp Acceptance Service Corporation
First Savings Corporation
FSC Development Corporation
THL, Ltd.
Tapa Holdings, Inc.
West Cook-DuPage Development Company
West Suburban Investments, Inc.
Financial Reserve, Incorporated
First Paddle Creek, Inc.
Forest Creek Holdings, Ltd.
West Suburban Investments of CA
West Suburban Investments of CO
West Florida Investments, Inc.

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APPLICABLE STATUTES AND RULES

28 U.S.C. §1257(a)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

U.S. Supreme Court Rule 10.1

A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

a. When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

b. When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

c. When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Federal Rule of Appellate Procedure 34(a)

Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard:

Oral Argument will be allowed unless

(1) the appeal is frivolous; or

(2) the dispositive issue or set of issues has been recently authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

Illinois Supreme Court Rule 305(j)

Failure to Obtain Stay; Effect on Interests in Property. If a stay is not perfected within the time for filing the notice of appeal, or within any extension of time granted under subparagraph (c) of this rule, the reversal or modification of the judgment does not affect the right, title, or interest of any person who is not a party to the action in or to any real or personal property that is acquired after the judgment becomes final and before the judgment is stayed; nor shall the reversal or modification

affect any right of any person who is not a party to the action under or by virtue of any certificate of sale issued pursuant to a sale based on the judgment and before the judgment is stayed. This paragraph applies even if the appellant is a minor or a person under legal disability or under duress at the time the judgment becomes final.

Illinois Supreme Court Rule 352(a)

Request; Waiver; Dispensing With Oral Argument. A party shall request oral argument by stating at the bottom of the cover page of his or her brief that oral argument is requested, or, if the party has allowed a petition for leave to appeal or answer to stand as his or her brief, by mailing to the clerk and to opposing parties, within the time in which the party could have filed a further brief, a notice requesting oral argument. If any party so requests, all other parties may argue without an additional request. No party may argue unless that party has filed a brief as required by the rules and paid any fee required by law. A party who has requested oral argument and who thereafter determines to waive oral argument shall promptly notify the clerk and all other parties. Any other party who has filed a brief without requesting oral argument may then request oral argument upon prompt notice to the clerk and all other parties.

After the briefs have been filed, the court may dispose of any case without oral argument if no substantial question is presented, but this power should be exercised sparingly.

735 ILCS 5/15-1509(a)

After (i) confirmation of the sale, and (ii) payment of the purchase price and any other amounts required to be paid by the purchaser at sale, the court (or, if the court shall so order, the person who conducted the sale or such person's successor or some persons specifically appointed

by the court for that purpose), shall upon the request of the holder of the certificate of sale (or the purchaser if no certificate of sale was issued), promptly execute a deed to the holder or purchaser sufficient to convey title. Such deed shall identify the court and the caption of the case in which judgment was entered authorizing issuance of the deed. Signature and the recital in the deed of the title or authority of the person signing the deed as grantor, of authority pursuant to the judgment and of the giving of the notices required by this Article is sufficient proof of the facts recited and of such authority to execute the deed, but such deed shall not be construed to contain any covenant on the part of the person executing it. If the deed issues to a grantee prior to the expiration of the period for appealing the confirmation of sale, and the grantee conveys title to another party within that period, that other party will not be deemed a bona fide purchaser unless and until such period expires without an appeal having been filed or, an appeal having been filed, such appeal is denied or withdrawn.

STATEMENT OF THE CASE

On October 10, 1990, a Judgment of Foreclosure and Sale was entered in favor of Citicorp Savings of Illinois, n/k/a Citibank, F.S.B. ("Citibank") and against Fred Rucker ("Rucker") (the "Judgment"). (Supplemental Record, C.3). The Judgment included an award for the insurance premiums of which Rucker now complains. The Judgment was not appealed.

On November 16, 1993, a sheriff's sale was conducted at which Citibank bid the entire Judgment debt and was the successful bidder (R. C84). On December 10, 1993, the sale was confirmed. (Supplemental Record, C13). Rucker appealed the confirmation of the sale to the Illinois Appellate Court. No stay was entered pending appeal.

On October 19, 1994, during the pendency of the appeal, Citibank sold the foreclosed property to James H. Wooten, Jr. and Gertrude D. Wooten (the "Wootens"). The Wootens are not parties to this action and are not nominees of Citibank. Citibank retains no interest in the foreclosed property.

On June 1, 1995, Citibank filed its Motion to Dismiss the appeal because Rucker's challenge to confirmation of the foreclosure sale was rendered moot by Citibank's conveyance to a *bona fide* purchaser for value. On June 15, 1995, the Appellate Court granted Citibank's Motion. On July 20, 1995, Rucker's Petition for Re-Hearing was denied. On December 6, 1995, the Illinois Supreme Court denied Rucker's Petition for Leave to Appeal.

During the pendency of the appeal, Rucker continued to prosecute his Counterclaim against Citibank for damages, which is based in part on the alleged overcharges

for insurance premiums that were awarded to Citibank in the Judgment. Although the Counterclaim was pending in the trial court when Rucker's appeal was dismissed, the Counterclaim has since been dismissed and is the subject of a separate appeal by Rucker to the Illinois Appellate Court, which is known as Case No. 95-3551.

No federal constitutional issues were raised below. Rather, the only constitutional argument advanced by Rucker was in his Petition for Leave to Appeal to the Illinois Supreme Court, which, for the first time, alleged a violation of the Illinois Constitution. *See* Appendix.[1]

SUMMARY OF THE ARGUMENT

Jurisdiction over a petition for writ of certiorari is dependent on whether the petitioner raised a federal question below. In this case, because Rucker failed to do so, this Court lacks jurisdiction.

In any event, no due process violation occurred. As a matter of Illinois law, Rucker's state court appeal was rendered moot, and oral argument became unnecessary, when the property that was the subject of the appeal was sold pending appeal. Rucker's Petition involves well-established principles of state law, rather than issues of constitutional import, and should be denied.

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[1] For the convenience of the Court, Rucker's Petition for Leave to Appeal is included in the Appendix without exhibits.

ARGUMENT

Rucker's Petition for Writ of Certiorari should be denied for several reasons. First, this Court lacks jurisdiction because no federal constitutional issues were raised below. Second, even if such issues had been raised, no due process violation has occurred.

I. The Court Lacks Jurisdiction.

This Court's jurisdiction is premised on 28 U.S.C. §1257(a). At a minimum, to invoke such jurisdiction on a petition for writ of certiorari, Rucker must have raised a federal constitutional question below. *Illinois v. Gates*, 103 S.Ct. 2317, 2321, 462 U.S. 213, 218-20 (1983). If not, this Court lacks jurisdiction to hear that claim, and Rucker's Petition should be denied. *Banker's Life & Casualty Co. v. Crenshaw*, 108 S.Ct. 1645, 1649-50, 486 U.S. 71, 76-78 (1988).

Although Rucker attempted to raise a state constitutional claim in the Illinois Supreme Court, that does not support this Court's jurisdiction. *Bowe v. Scott*, 34 S.Ct. 769, 771, 233 U.S. 656, 664-65 (1914). Furthermore, even if Rucker had asserted a federal constitutional claim in the Illinois Supreme Court, because he did not assert the claim in the Appellate Court, he waived his right to do so, *Hammond v. North American Asbestos Corp.*, 97 Ill. 2d 195, 454 N.E.2d 210, 218 (1983), and this Court lacks jurisdiction to hear the claim. *Bailey v. Anderson*, 66 S.Ct. 66, 68, 326 U.S. 203, 206-07 (1945).

II. Cancellation of Oral Argument Upon Dismissal of an Appeal Does Not Violate Due Process.

Rucker's Petition is based on his dissatisfaction with long-standing principles of Illinois law which, absent a stay, mandate dismissal of an appeal if effective relief cannot be granted. The application of those principles in this case does not raise any constitutional issues.

A. Illinois Supreme Court Rule 305(j) Mandated the Dismissal of Rucker's Appeal on the Grounds of Mootness.

As a matter of Illinois law, absent a stay pending appeal, an appeal which seeks to recover possession and ownership of property is moot and must be dismissed when a court cannot grant effective relief because the property has been conveyed to a third party. *Cosmopolitan National Bank of Chicago v. Nunez*, 265 Ill. App. 3d 1012, 639 N.E.2d 636 (1st Dist. 1994); *Avondale Savings & Loan Assoc. v. Amalgamated Trust & Savings Bank*, 78 Ill. App. 3d 234, 397 N.E.2d 121 (1st Dist. 1979) (principle applied to mortgage foreclosure sale). Although the result would be no different under federal law, Rucker's reference to the ability of Article III Courts to decide questions of mootness is inapplicable because this case involves the state, rather than federal, courts.

Under Illinois Supreme Court Rule 305(j), a reviewing court cannot grant effective relief when foreclosed property is sold to an unrelated third party pending appeal because a reversal or modification of the judgment does not affect the third party's rights. As a result, the sale to

the Wootens rendered Rucker's appeal moot.[2] Therefore, Illinois Supreme Court Rule 305(j), and the cases cited herein, mandated dismissal of Rucker's appeal.

B. Rucker's Due Process Arguments are Without Merit And Do Not Warrant Consideration By This Court.

Relying on general statements of constitutional law and platitudes concerning the purported benefits of oral argument, Rucker claims that his due process rights were violated when oral argument was cancelled due to dismissal of the appeal. However, it has long been established that there is no constitutional due process right to an appeal, let alone a right to present oral argument. *Griffin v. Illinois*, 76 S.Ct. 585, 590, 351 U.S. 12, 18 (1956). Rucker not only ignores such precedent, but fails to cite Illinois Supreme Court Rule 352(a) and glosses over Federal Rule of Appellate Procedure 34(a), both of which provide that oral argument is not necessary if the court can readily dispose of a case. Clearly, when a case has been concluded for mootness, no oral argument is necessary.

Supreme Court Rule 10.1 provides that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion." Rucker's Petition involves nothing more than a request for this Court to review state court rulings on matters of purely state law. Thus, it does not raise spe-

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[2] Contrary to Rucker's argument, 735 ILCS 5/15-1509(a) is inapplicable because it only applies to conveyances made within thirty (30) days of confirmation of the foreclosure sale.

cial or important considerations which would warrant this Court's exercise of jurisdiction.

CONCLUSION

Rucker's Petition for Writ of Certiorari should be denied because it raises absolutely no constitutional issues or violations.

Respectfully submitted,

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Dated: June 7, 1996

APPENDIX

No. _____

IN THE SUPREME COURT OF ILLINOIS

CITICORP SAVINGS OF ILLINOIS,

Plaintiff-Respondent,

vs.

FRED RUCKER, et al.,

Defendant-Petitioner.

Petition for Leave to Appeal from the Appellate Court of Illinois, First District, No. 94-0636. There Heard on Appeal from the Circuit Court of Cook County, Illinois, No. 88 CH 10806. Honorable Robert D. Ericsson, Judge Presiding.

PETITION FOR LEAVE TO APPEAL

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IN THE SUPREME COURT OF ILLINOIS

CITICORP SAVINGS OF ILLINOIS,

Plaintiff-Respondent,

vs.

FRED RUCKER, et al.,

Defendant-Petitioner.

Petition for Leave to Appeal from the Appellate Court of Illinois, First District, No. 94-0636. There Heard on Appeal from the Circuit Court of Cook County, Illinois, No. 88 CH 10806. Honorable Robert D. Ericsson, Judge Presiding.

PETITION FOR LEAVE TO APPEAL

The Defendant-Petitioner, Fred Rucker, et al. respectfully petitions this Court for leave to appeal from the judgment of the Appellate Court of Illinois, First District.

JUDGMENT BELOW

On June 15, 1995, the Appellate Court granted Plaintiff-Respondent Citicorp Savings of Illinois' motion to dismiss for mootness in the above captioned matter. On June 30, 1995, Defendant-Petitioner Fred Rucker, et al. filed a Petition for ReHearing on Plaintiff-Respondent's motion to dismiss. On July 20, 1995, the Appellate Court denied Defendant-Petitioner's Petition for Re-Hearing. On August 10, 1995, Defendant-Respondent filed an Affi-

davit of Intent to File a Petition for Leave to Appeal in the Appellate Court.

POINTS RELIED UPON FOR REVERSAL

1. On the motion of Plaintiff-Respondent Citicorp Savings of Illinois, the Appellate Court found that this appeal was moot in that the property in question had been allegedly conveyed to a third party. The Appellate Court did so despite the following facts:

a. Plaintiff-Respondent Citicorp Savings of Illinois charged an annual insurance premium on a monthly basis in the foreclosure action that is the basis for this Petition and did so to such an extant that of the outstanding $53,400.00 of the mortgage demanded by Plaintiff-Respondent Citicorp Savings of Illinois at the time of foreclosure, over one third consisted of said insurance overcharges fraudulently added by Citicorp to the mortgage amount in question.

b. The central issue before the Appellate Court was the trial court's affirmation of a Sheriff's sale of the property in question that included more than $18,000.00 in before mentioned illegal charges. The trial court, in approving such a sheriff's sale clearly abused its discretionary authority and such a sale should be set aside. Radar v. Bussey 313 Ill. 226, 145 N.E. 192 (1924).

c. In the final months preceding the Appellate Court's denial of Defendant-Petitioner's petition for Re-Hearing on July 20, 1995, on January 23, 1995, it was ordered that this appeal be heard without benefit of oral argument which was then overturned by an April 23, 1995 order granting oral argument.

This argument was re-scheduled twice before the entire appeal was dismissed for mootness on the basis that Plaintiff-Respondent Citicorp Savings of Illinois conveyed the property in question to a third party prior to the date that Fred Rucker's appeal was to be heard and decided upon by the Appellate Court. A copy of the orders of the Appellate Court is attached hereto a Defendant-Petitioner's Exhibit A.

The evidence that was before the Appellate Court clearly established that Plaintiff-Respondent Citicorp Savings of

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Illinois foreclosed the property in question based on illegal and fraudulent charges. This approval of the Sheriff's sale resulted in a violation of the rights of Fred Rucker under Article One, Section Two of the Constitution of the State of Illinois where Mr. Rucker was deprived of his property without due process. The Appellate Court did not address that issue in dismissing the before mentioned appeal for mootness.

ARGUMENT

Now comes Defendant-Petitioner Fred Rucker ("Fred Rucker"), by his attorney Clarke P. Devereux and hereby requests that this Court allow his petition for leave to appeal so that the judgment of the Appellate Court may be reviewed and reversed and in support hereby states as follows:

1) On June 1, 1995, Citicorp filed a motion to dismiss the appeal of Fred Rucker on the basis that where Citicorp conveyed the property in question to a third party

prior to the date that Fred Rucker's appeal was to be heard and decided upon by the appellate court, this appeal was moot where Fred Rucker cannot be replaced in possession of the foreclosed property.

2) On June 15, 1995, the Appellate Court of Illinois of the First Judicial District granted Plaintiff-Respondent Citicorp's motion to dismiss for mootness and dismissed the appeal of Defendant-Petitioner Fred Rucker. Fred Rucker's Petition for Re-Hearing on Citicorp's motion to dismiss was denied on July 20, 1995.

3) Citicorp's motion was based on an affidavit of a "Louise Tuck", with no certified documents attached, which set forth the general conclusion that a division of Citicorp sold the

property in question to third party referred to as "Wooten". The before mentioned affidavit contained no particularized facts of evidentiary value, did not affirmatively show that affiant Tuck would be competent to testify to whatever conclusions contained therein and no affidavits of the supposed third party were attached.

4) Citicorp argued that where they allegedly conveyed the property in question during the pendency of this appeal to a third party, the appeal of Fred Rucker was moot where no stay has been obtained within the time for filing the appeal.

5) Citicorp cited the case of Cosmopolitan National Bank v. Nunez 265 Ill. App. 3rd 1012, 639 N.E.2d 636 (1st Dist. 1994) in support of its motion. It should be noted that in Cosmopolitan, the defendant admitted in a hearing before the trial court that she had not only never

made any mortgage payments, but that she had also never had obtained fire insurance of any kind which was a condition of her mortgage. 265 Ill. App. 3d at 1014. Also the plaintiff in Cosmopolitan supported their motion to dismiss with an affidavit with a direction to convey attached along with a closing statement and transfer declarations. 265 Ill. App. at 1012.

6) Fred Rucker at no time has ever admitted or sought to admit that he had neglected to ever meet his mortgage payments on the property in question and obtain insurance for the property. It should also be noted that prior to the foreclosure involved in

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this appeal, Fred Rucker had insurance for his property and it was Citicorp's actions in charging an annual insurance premium on a monthly basis that was the cause of this foreclosure action in the first place.

7) Under Cosmopolitan, the Tuck affidavit is completely lacking in substance to support Citicorp's argument that they conveyed the property in question to a third party. 265 Ill App. 3d at 1015. The affidavit in conclusory, not based on personal knowledge, does not set forth facts admissible in evidence and does not affirmatively show that Louise Tuck would be competent to testify to any of the conclusions contained therein at trial. Under Supreme Court Rules 191, 276 and 361 governing affidavits, the Tuck affidavit is defective and should not have been considered by the Appellate Court. Staren & Co. v. Shapiro 32 Ill. App 3d 396, 400: 336 N.E. 2d 228 (1st District 1972); Inland Real Estate Corporation v. Seymour 56 Ill. App. 3d 581, 583; 371 N.E.2d 1187 (1st District 1977); Burkett v. Finger Lake Development Cor-

poration 32 Ill. App. 3d 396, 400; 336 N.E. 2d 628 (Fifth Dist. 1975).

8) Unless the record clearly showed that the third party purchasers of property were not parties to the litigation or nominees of party, Illinois Supreme Court Rule 305 (j) regarding stays does not apply. Pinnacle Corporation v. Lake in the Hills 258 Ill. App.3d 205, 208; 630 N.E. 2d 502 (2d Dist. 1994). Also, where Citicorp argued that, under Illinois law, this appeal was

moot because the property in question had been conveyed to a third party during the pendency of an appeal, 735 ILCS 5/15-1509 (a) states the following:

"If the deed issues to a grantee prior to the expiration of the period for appealing confirmation of sale, and the grantee conveys title to another party within that period, that other party shall not be deemed a bona fide purchaser unless and until such period expires without an appeal having been filed or such appeal is denied or withdrawn." 735 ILCS 5/15-1509 (a).

In regard to Citicorp's motion to dismiss, if their argument was followed to its inevitable conclusion, the alleged third party purchasers are not Bona Fide purchasers of the foreclosed property in question and Fred Rucker can regain title to the property in question.

9) The issues on appeal were not whether the relief sought could be granted if the property in question had been sold or if there was a pending counter-claim in the Chancery Division of the Circuit Court. The issues on appeal were the following:

-Did the trial judge abuse his discretionary authority by approving a Sheriff's sale with elements of fraud involved on the part of Citicorp?

-Did Plaintiff-appellee Citicorp misrepresent themselves when establishing a grossly inflated sales price on the property in question and violate the Illinois Consumer Fraud Act (Illinois Revised Statutes Ch. 121 1/2 sec. 261 et seq.)

9) Of the $53,400.00 amount that Citicorp alleged that

Rucker owed on the mortgage of the property in question, over one third of the amount consisted of insurance overcharges and other fees fraudulently added by Citicorp to the mortgage amount in question. Plaintiff-appellee Citicorp virtually admitted the above-mentioned facts in correspondence to Defendant-appellee Fred Rucker attached hereto as Defendant-Petitioner's Exhibits B, C and D.

10) The trial judge, in approving the sheriff's sale for a figure containing $18,000.00 in false charges from Plaintiff-appellee Citicorp clearly abused his discretionary authority. Radar v. Bussey 313 Ill. 226, 145 N.E. 192 (1924).

11) In adding nearly $18,000.00 to the mortgage of the property in question, Plaintiff-appellee Citicorp misrepresented itself in violation of the Illinois Consumer Fraud Act. In interpreting the Illinois Consumer Fraud Act, the courts have declined to use the restrictive elements of common law fraud, but have been willing to give effect to legislative goals behind enactment of this genre of consumer protection legislation. Eshagi v. Han-

ley Dawson Cadillac Co. Inc., 214 Ill. App.3d 995, 1001; 574 N.E.2d 760 (1st Dist. 1991). In determining whether a practice is unfair under the Consumer Fraud Act, courts are guided by the following factors: Whether a practice, even if not unlawful, offends public policy as established by statutes, the common law or otherwise, or whether if is at least within the penumbra of some established concept of unfairness; and whether it is immoral, unethical, oppressive or unscrupulous; and whether

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it results in substantial injury to consumers. Ekl v. Knecht 223 Ill. App. 3d 234, 585 N.E.2d 156, 163 (2nd Dist. 1991). In adding $18,000.00 to the mortgage price in false charges, Plaintiff-appellee Citicorp clearly violated the Illinois Consumer Fraud Act.

CONCLUSION

The approval of the Sheriff's sale of the property in question amounts to a violation of the rights of Mr. Rucker under Article One, Section Two of the Constitution of the State of Illinois. Not only was Fred Rucker deprived of his property, but he was also denied an opportunity to actually repurchase the property due to the illegal and fraudulently inflated price.

In order for justice to be served, the facts must be considered. Neither the trial court nor the Appellate Court ever considered the salient fact that the purchase price of this property was illegally inflated by over one-third by the Plaintiff-Respondent.

For the foregoing reasons, Defendant-Petitioner, Fred Rucker, et al. respectfully requests that this Court allow

his petition for leave to appeal so that the judgment of the appellate court may be reviewed and reversed.

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Respectfully, submitted,

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August 24, 1995